YUSSOF DANIEL KHAIRUL HISHAM v. PP

HIGH COURT MALAYA, MELAKA
MOHD RADZI ABDUL HAMID J
[CRIMINAL REVISION NO: MA-43(A)-3-09-2024]
13 DECEMBER 2024

Abstract – *The expression 'the prosecution shall have control over the direction of all criminal proceedings and prosecutions' means not only that the prosecution must act honestly, without fear or favour, and to ensure that the prosecution of charges are based upon the legitimacy of its evidence and fair play to the accused, but also that the prosecution must manage its witnesses in the interest of timely conclusion of its case within the time allocated by the court. When the conclusion of its case cannot be achieved despite multiple orders of discharge not amounting to acquittal and repeated refiling of a charge against the accused, then the prosecution should not stand in the way of the accused's discharge and acquittal on the grounds of fair play and justice towards the accused. The prosecution must bear the consequences of its own failures.*

CRIMINAL PROCEDURE: *Acquittal or discharge – Discharge not amounting to acquittal ('DNAA') – Application to set aside order of DNAA – Postponement of trials due to non-attendance of material witness – Whether there were unresolved impediments in progress of trial – Whether accused prejudiced by delay in trials – Whether prosecution had control over conduct of case – Whether an abuse of process of court – Whether accused ought to be discharged and acquitted – Criminal Procedure Code, ss. 254, 323 & 376*

CRIMINAL PROCEDURE: *Revision – Acquittal or discharge – Discharge not amounting to acquittal ('DNAA') – Application to set aside order of DNAA – Postponement of trials due to non-attendance of material witness – Whether accused prejudiced by delay in trials – Whether grave injustice on accused to have charge looming over his head without foreseeable certainty on when prosecution could conclude case – Whether prosecution had control over conduct of case – Whether there were unresolved impediments in progress of trial – Whether abuse of process of court – Whether accused ought to be discharged and acquitted – Criminal Procedure Code, ss. 254, 323 & 376*

CRIMINAL PROCEDURE: *Prosecution – Proceedings – Postponement of trials due to non-attendance of material witness – Unresolved impediments in progress of trial – Whether prosecution had control over conduct of case – Whether abuse of process of court – Whether prosecution could stand in way of accused's discharge and acquittal – Whether prosecution must bear consequences of its own failures – Criminal Procedure Code, ss. 254, 323 & 376*

The applicant was initially charged on 2 November 2022 for an offence under s. 12(2) of the Dangerous Drugs Act 1952. On 9 March 2024, the Magistrate ordered the applicant to be discharged not amounting to acquittal ('DNAA') after the prosecution's witness, SP5, who was the raiding officer in that case, failed to appear to complete his examination-in-chief. The applicant was then charged again for the same offence and on 13 May 2024, SP5 again failed to appear as a witness. Consequently, the Magistrate made the same order of DNAA. The prosecution was determined to continue prosecuting the applicant and the applicant was then charged again for the same offence on 6 August 2024 ('charge') and on 3 September 2024, for the third time, SP5 was again absent from trial. The court was informed that SP5 was in Sabah but it appeared that the prosecution could not offer any information on why SP5 was in Sabah and not in court to give evidence. The applicant then sought for him to be discharged and acquitted of the charge on the grounds that the applicant had been prejudiced by the inordinate delay by the prosecution in completing their case. Instead of acquitting the applicant, the Magistrate made the same order of DNAA pursuant to s. 254(3) of the Criminal Procedure Code ('CPC') and directed that in the event the applicant was charged again, the trial shall proceed on the same day. Dissatisfied, the applicant sought to move this court to exercise its powers of revision under s. 323 of the CPC to set aside that order and to substitute it with an order discharging and acquitting the applicant of the charge. The crux of the application rested on the applicant's complaint that he was prejudiced by the delay in the trials caused by the continued absence of SP5.

Held (discharging and acquitting applicant):

(1) SP5 was an officer and as an officer of the law, he should certainly know better his duties to give evidence in a court trial as and when required and it would be his duty to inform the Public Prosecutor of his whereabouts and his circumstances. The prosecution could not offer any explanation why SP5 remained in Sabah and why he could not make himself available at the trial. From the minutes of the Magistrates' Court, the prosecution stated that it had informed the investigating officer of the need for SP5's attendance, but no action was taken. It would appear therefore that not only was the trial scuttled by SP5 but also by the investigating officer. The fact that the prosecution was at a loss over SP5's absence compounded by the investigating officer's inaction showed that the prosecution did not have control over the conduct of its case as dictated by s. 376 of the CPC. (para 17)

(2) The expression 'the prosecution shall have control over the direction of all criminal proceedings and prosecutions' means not only that the prosecution must act honestly, without fear or favour, and to ensure that

the prosecution of charges are based upon the legitimacy of its evidence and fair play to the accused, but also that the prosecution must manage its witnesses in the interest of timely conclusion of its case within the time allocated by the court, especially when the accused had been DNAA and charged repeatedly. A decision to prosecute necessitates the accused to incur time and legal expenses to defend himself for which there is no provision that he can recover costs if he is acquitted. Thus, the prosecution owed its duty not only to itself and the court but also to the accused. Unless there are truly extenuating circumstances or excused by the court, the prosecution must ensure its witnesses are present when they are required to, more so when they are officers of the law. (paras 18 & 19)

(3) The prosecution had three opportunities under three separate cases to ensure the presence of SP5 but failed to do so. The prosecution was unable to proceed with its case without SP5. Although the prosecution maintained its intention to continue with the prosecution of the charge against the applicant, it would be a grave injustice on the applicant to have the charge looming over his head without any foreseeable certainty on when exactly the prosecution could conclude its case with the attendance of SP5. The applicant was stuck with the stigma that the public may perceive him of being guilty when he is charged over and over again with no prospect for him to present his defence. The Public Prosecutor's preference to not expressly communicate that he does not propose further to prosecute the accused upon the charge but instead to just state that he intended to proceed with the prosecution after he had located his witness did not preclude this court's discretion to order an acquittal under s. 254(3) of the CPC. (paras 21 & 22)

(4) It is an anathema to the principle of fair play and justice to allow the prosecution to use the provision of s. 254 of the CPC to hold onto the charge and then charge an accused repeatedly on the basis that it intended to still prosecute the accused despite it being clear that there remained unresolved impediments in the progress of a trial. To allow such situation to continue without certainty when such impediments could be resolved would amount to an abuse of the process of the court. When the conclusion of its case could not be achieved despite multiple orders of DNAA and repeated refiling of a charge against the accused as in this application, then the prosecution should not stand in the way of the accused's discharge and acquittal on the grounds of fair play and justice towards the accused. The prosecution must bear the consequences of its own failures. (paras 23 & 24)

Case(s) referred to:
Boucher v. The Queen [1954] 110 Can CC 263 ***(refd)***
Bunya Jalong v. PP [2015] 5 CLJ 893 CA ***(refd)***
Cheak Yoke Thong v. PP [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87 FC ***(refd)***
DPP v. Arthurs [1999] IEHC 73 ***(refd)***
Goh Cheng Chuan v. PP [1990] CLJU 85; [1990] 1 LNS 85 ***(refd)***
Johnson Tan Han Seng v. PP & Other Appeals [1977] CLJU 38; [1977] 1 LNS 38 FC ***(refd)***
K Abdul Rasheed v. PP; Ah Chak Arnold v. PP [1985] CLJU 54; [1985] 1 LNS 54 ***(refd)***
Koh Teck Chai v. PP [1967] CLJU 72; [1967] 1 LNS 72 HC ***(refd)***
Mohamed Kanathi Meerah Mydin v. PP [2019] 2 CLJ 28 CA ***(refd)***
Nicholas Mazivanan v. PP [2024] 9 CLJ 736 HC ***(refd)***
PP v. Ambika MA Shanmugam [2021] 2 CLJ 522 CA ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
PP v. Kulasingam [1974] CLJU 118; [1974] 1 LNS 118 HC ***(refd)***
PP v. Lau Ngiik Yin [2008] 10 CLJ 410 HC ***(refd)***
Shiv Kumar v. Hukam Chand & Anor [1999] 7 SCC 467 ***(refd)***
Tan Hoo Eng v. PP [2019] CLJU 893; [2019] 1 LNS 893 CA ***(refd)***
Vigny Alfred Raj Vicetor Amratha Raja v. PP [2022] 8 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 254(3), 254A, 323, 376
Dangerous Drugs Act 1952, s. 12(2)
Federal Constitution, art. 5(1)

For the applicant - Ahmad Musthafi Mohamad; M/s Hashim Amran Tabian Ahmad
For the respondent - Nor Azizah Yusof; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Radzi Abdul Hamid J:

Matter Before This Court

[1] This is a decision on an application for revision brought by the applicant against the decision of the Magistrate who had on 3 September 2024 given an order for discharge not amounting to acquittal after the prosecution's witness was not present at the trial for the third time in as many cases against the applicant based on the same offence.

Background Facts

[2] The applicant was initially charged in case MA-82D-28-11-2022 on 2 November 2022 for an offence under s. 12(2) of the Dangerous Drugs Act 1952. On 9 March 2024, the Magistrate ordered the applicant to be discharged not amounting to acquittal ('DNAA') after the prosecution's witness, SP5, who was the raiding officer in that case failed to appear to complete his examination-in-chief. The applicant was then charged again for

the same offence in case MA-82D-6-03-2024 and on 13 May 2024, SP5 again failed to appear as witness. Consequently, the Magistrate made the same order of DNAA. The prosecution was determined to continue prosecuting the applicant and the applicant was then charged again in case MA-82D-28-08-2024 for the same offence on 6 August 2024 ('charge') and on 3 September 2024 for the third time SP5 was again absent from the trial. The court was informed that SP5 was in Sabah but it appears that the prosecution could not offer any information on why SP5 was in Sabah and not in court to give evidence.

[3] Counsel for the applicant then sought for the applicant to be discharged and acquitted of the charge on the grounds that the applicant has been prejudiced by the inordinate delay by the prosecution in completing their case. Instead of acquitting the applicant, the Magistrate made the same order of DNAA pursuant to s. 254(3) of the Criminal Procedure Code ('CPC') and directed that in the event the applicant is charged again, the trial shall proceed on the same day.

[4] The applicant, being dissatisfied with that decision, seeks to move this court to exercise its powers of revision under s. 323 of the CPC to set aside that order and to substitute it with an order discharging and acquitting the applicant of the charge.

Arguments Of Parties

[5] Learned counsel for the applicant essentially contends that the prosecution's inability to complete its case since 2022 due to SP5's absence has prejudiced the applicant's right to a fair and speedy trial as guaranteed under art. 5(1) of the Federal Constitution. Counsel argues that this is not a case where the applicant is still being charged under the same case MA-82D-28-11-2022 but he has been charged repeatedly for the same offence under two separate cases after that and the applicant was DNAA each time. It was argued that the Magistrate should have ordered the applicant to be discharged and acquitted of the charge when the prosecution cannot explain why SP5 was in Sabah and not in court to give evidence. The prosecution had the opportunity to secure the attendance of SP5 on two prior trials but failed and therefore the prosecution's statement to the court that they wish to continue with the prosecution against the applicant should not have been accepted. There was no guarantee that SP5 will appear if the applicant was charged again and that the trial can resume under s. 254A of the CPC.

[6] Reference was made to the decisions in *PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329; [1987] MLJU 4; *DPP v. Arthurs* [1999] IEHC 73 and *Cheak Yoke Thong v. PP* [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87; [1984] 2 MLJ 119.

[7] The prosecution argues that this is a case where the trial had proceeded with four prior witnesses giving evidence and exhibits marked. The prosecution intends to complete its case and therefore intends to continue prosecuting the applicant. Thus, an opportunity should be given to the prosecution to locate SP5 and secure his attendance in court. This case ought to be distinguished from those cases where the prosecution has expressed its desire to not continue with prosecuting the accused as provided under s. 254 of the CPC. For that reason, the order to DNAA should not be disturbed.

The Law On Revision

[8] The law on revision and the power of the High Court in hearing revisions is a settled law and needs no discussion. For the sake of completeness, it would suffice to refer to the oft-quoted decision in *PP v. Kulasingam* [1974] CLJU 118; [1974] 1 LNS 118; [1974] 2 MLJ 26, where Hashim Yeop A Sani J (as he then was) stated the following:

> The powers of the High Court in revision are amply provided under s. 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower Court should be interfered with in the interest of justice.

Deliberations

[9] The crux of this application rests on the applicant's complaint that he is prejudiced by the delay in the trials caused by the continued absence of SP5. It is indisputable that the law recognises the accused's right to a speedy conclusion of the trial. It has been often said that delays in trial, especially in minor offences, will cause embarrassment and hardship to the accused as he will be faced with the public's impression that he is guilty of the offence even before a decision is made.

[10] In determining whether the Magistrate was right in making the order for DNAA and not DAA under s. 254(3) of the CPC, there should be an appreciation of the requirements under s. 254 and this was discussed in detail in the Federal Court case of *Vigny Alfred Raj Vicetor Amratha Raja v. PP* [2022] 8 CLJ 1; [2022] MLJU 1837. It was held that to invoke the application of s. 254, there must be a deliberate communication from the prosecution that he will not further prosecute. The default position as opined by the majority of the panel is that the order must be to discharge without an acquittal unless otherwise directed by the court. Since the default position is a discharge without acquittal, then there must be circumstances on record, or the accused must show reasons that the position must be displaced in favour of an acquittal.

[11] Although the default position is that the order is to discharge without acquittal, there remains the unfettered discretion of the court to make an order of acquittal where the facts and circumstances warrant so. That discretion must be exercised judiciously. Zabariah Mohd Yusof FCJ states:

> [92] I have read and examined the authorities and cases referred to, in the judgment and found that, they never ruled on the interpretation to be accorded to s. 254(3) of the CPC to the effect that "the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal." In my view, what those cases held were that, the court is vested with the discretionary power to direct an acquittal of an accused person pursuant to s. 254(3) of the CPC and that such discretion is to be exercise judiciously. In other words, s. 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge to amount to an acquittal, if circumstances warrant it. The following cases support this proposition:
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> (i) *PP v. Ambika M A Shanmugam* [2021] 2 CLJ 522; [2021] 2 MLJ 723;
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> (ii) *Mohamed Kanathi Meerah Mydin v. PP* [2019] 2 CLJ 28; [2019] 2 MLJ 194;
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> (iii) *Goh Cheng Chuan v. PP* [1990] CLJU 85; [1990] 1 LNS 85; [1990] 3 MLJ 401;
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> (iv) *Koh Teck Chai v. PP* [1967] CLJU 72; [1967] 1 LNS 72; [1968] 1 MLJ 166;
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> (v) *Seet Ah Ann v. PP* [1950] CLJU 81; [1950] 1 LNS 81; [1950] MLJ 293;
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> (vi) *Goh Oon Keow & Anor v. Rex* [1948] CLJU 14; [1948] 1 LNS 14; [1949] MLJ 35; and
>
> (vii) *Tan Ah Chan v. Regina* [1955] CLJU 155; [1955] 1 LNS 155; [1955] MLJ 218.

[12] In *PP v. Lau Ngiik Yin* [2008] 10 CLJ 410; [2007] MLJU 668, the prosecution had applied for an order of DNAA against the accused when the prosecution could not locate one important witness. The accused was charged for the offence of murder, and he was already in remand for 20 months. Although the court gave the prosecution time to decide whether to continue with the prosecution, the court held the view that the court must order an acquittal and not DNAA when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and it is unlikely the case can be prosecuted expeditiously in the short time.

[13] In the Singapore High Court decision of *Goh Cheng Chuan v. PP* [1990] CLJU 85; [1990] 1 LNS 85; [1990] 3 MLJ 401, the prosecution merely stated that it wished to proceed with the prosecution when it has located its witnesses without saying that it decided to not further prosecute. The

prosecution failed to locate its witness on multiple dates and even up until the hearing of the appeal before the High Court. The facts in that case are not too dissimilar with the facts in the present application. In deciding to acquit the appellant, Thean J expressed:

> ... Even at the hearing before me, *ie*, on 31 May 1990, I was informed by the deputy public prosecutor that the position remained as it was: the material witness was still not available and could not be traced. There was also the information, which was communicated to the district judge on 2 February 1987 and which was not disputed by the prosecution, that one of the complainants had passed away. Up to this date, approximately five years have elapsed since the charge was first brought against the appellant, and the charge relates to an offence alleged to have taken place some six and a half years ago. Clearly, the prosecution has had ample time to trace this witness, and the witness still cannot be found, notwithstanding the efforts made; the prospect of tracing this witness does not appear to have improved. The deputy public prosecutor informed me that the prosecution intended to proceed with the charge against the appellant and the charge would be proceeded with the moment the witness is found. However, this has been the position since the charge was first brought. While I accept that the charge against the appellant is a serious one and that the right of the prosecution to proceed against the appellant on the charge should be preserved, I also have to bear in mind that it is unfair to have a charge hanging over his head indefinitely. The court has to consider both public interest and fairness to an accused person, and having regard to both these factors and all the relevant circumstances of this case it is only fair to the appellant that the charge should not be left hanging over his head any longer. In my judgment, the discharge should amount to an acquittal, and I so order. The appeal is therefore allowed.

[14] In *K Abdul Rasheed v. PP; Ah Chak Arnold v. PP* [1985] CLJU 54; [1985] 1 LNS 54; [1985] 1 MLJ 193, the prosecution applied for an order for discharge not amounting to acquittal after it could not locate its witnesses but it did not expressly communicate that it did not intend to prosecute the appellant any further. In deciding to allow the appeal, the court held that:

> ... As I read the grounds of decision of the learned District Judge, it was implicit that the practice of the court was to order a discharge not amounting to an acquittal if the prosecution indicated that it was not withdrawing the charge. If this was the practice, as I think it was, I have to say that it was clearly wrong. For the reasons I had given in the earlier appeal, a court has to act judicially and consider both the public interest and any unfairness to an accused person ...

[15] Both decisions in *Goh Cheng Chuan* and *K Abdul Rasheed* were referred in *Vigny Alfred* and also by the Court of Appeal in *PP v. Ambika MA Shanmugam* [2021] 2 CLJ 522; [2021] 2 MLJ 723 and in *Mohamed Kanathi Meerah Mydin v. PP* [2019] 2 CLJ 28; [2019] 2 MLJ 194.

[16] Reference is also made to *Nicholas Mazivanan v. PP* [2024] 9 CLJ 736; [2024] 12 MLJ 326, a recent decision of the High Court sitting in Muar. In that case, the facts showed that despite numerous postponements and warnings, the prosecution failed to revert with any decision of a representation filed by the accused, there was lack of investigation, causing the charge to be in an uncertainty and there was failure to secure the attendance of witnesses. It must be noted that in that case, there was no decision by the prosecution to not prosecute the accused, he merely requested for a further postponement. The Magistrate ordered the accused to be discharged not amounting to an acquittal denying the accused's request to be acquitted. In deciding to grant the order of acquittal, the High Court held that the lack of the prosecution's readiness to prosecute arising from the repeated postponements implied that there was a lack of intention to prosecute the case diligently. The court also held that the court has the power to order an acquittal to prevent injustice and undue hardship to the accused.

[17] After having considered the facts in this application and guided by the decisions referred to above, this court finds sufficient reasons for this court to exercise its discretion in favour of the applicant. Particularly, the prosecution could not offer any explanation to this court why SP5 remains in Sabah and why he could not make himself available at the trial. SP5 is a police officer and as an officer of the law, he should certainly know better his duties to give evidence in a court trial as and when required and it would be his duty to inform the Public Prosecutor of his whereabouts and his circumstances. From the minutes of the Magistrates' Court on 3 September 2024, this court notes that the prosecution stated that it had informed the investigating officer of the need for SP5's attendance but no action was taken. It would appear therefore that not only was the trial scuttled by SP5 but also the investigating officer. The fact that the prosecution is at loss over SP5's absence compounded by the investigating officers' inaction show that the prosecution does not have control over the conduct of its case as dictated by s. 376 of the CPC.

[18] In this court's view, the expression "the prosecution shall have control over the direction of all criminal proceedings and prosecutions" means not only that the prosecution must act honestly, without fear of favour and to ensure that the prosecution of charges are based upon the legitimacy of its evidence and fair play to the accused (see *Johnson Tan Han Seng v. PP & Other Appeals* [1977] CLJU 38; [1977] 1 LNS 38; [1977] 2 MLJ 66; *Shiv Kumar v. Hukam Chand & Anor* [1999] 7 SCC 467 and *Boucher v. The Queen* [1954] 110 Can CC 263), but also that the prosecution must manage its witnesses in the interest of timely conclusion of its case within the time allocated by the court, especially as in the present case when the accused has been DNAA and charged repeatedly.

[19] As expressed by the Court of Appeal in *Bunya Jalong v. PP* [2015] 5 CLJ 893; [2015] 5 AMR 1; [2015] MLJU 0315, a decision to prosecute necessitates the accused to incur time and legal expense to defend himself for which there is no provision that he can recover costs if he is acquitted. Thus, the prosecution owes its duty not only to itself and the court but also to the accused. Of course, the accused's expectation of a speedy conclusion of a trial must take into account the realities of the high registration and backlog of cases that the courts experience. However, the fact that the Public Prosecutor has greater number of cases to prosecute in current times compared to 1987, when the case in *PP v. Choo Chuan Wang* (*supra*) was decided, should serve to remind the Public Prosecutor of the importance of managing and conducting his cases with even tighter rein so that they can be completed within the allocated dates. Failure to do so will result not only in the Public Prosecutor clogging his diary but also the court's. Thus, unless there are truly extenuating circumstances or excused by the court, the prosecution must ensure its witnesses are present when they are required to, more so when they are officers of the law.

[20] This court is reminded of the views expressed by the Court of Appeal in *Tan Hoo Eng v. PP* [2019] CLJU 893; [2019] 1 LNS 893; [2019] MLJU 622 that in considering the issue of delay, there must be a balance of the interest concerned, not only of the accused person but also the interest of the society and public at large, in the enforcement of the law to curb crimes.

[21] However, the facts in this application show that the prosecution has had three opportunities under three separate cases to ensure the presence of SP5 but failed to do so. Although this court does not find that there has been an inordinate delay in the conduct of the trials since each of the trials took place in 2024, the fact remains that the prosecution is unable to proceed with its case without SP5. Although the prosecution maintains its intention to continue with the prosecution of the charge against the applicant, it would be a grave injustice on the applicant to have the charge looming over his head without any foreseeable certainty on when exactly the prosecution can conclude its case with the attendance of SP5. The applicant is stuck with the stigma that the public may perceive him of being guilty when he is charged over and over again with no prospect for him to present his defence. He is a public servant and it is not difficult to estimate the level of anxiety he must endure in facing the uncertainties of the trial.

[22] Thus, this court takes the same position as decided in *Goh Cheng Chuan* (*supra*) that the Public Prosecutor's preference to not expressly communicate that he does not propose further to prosecute the accused upon the charge but instead to just state that he intends to proceed with the prosecution after he has located his witness does not preclude this court's discretion to order an acquittal under s. 254(3) of the CPC:

However, it is to be observed that *the deputy public prosecutor in invoking this section never uttered a word to the effect that she would 'not further prosecute' the accused. On the contrary, in applying for 'an order of discharge not amounting to an acquittal' she said, among other things, that 'the prosecution [had] every intention to proceed against the two accused' once the material witness was found*. This ingenious move, it seems to me, was adopted to obviate the difficulty which was considered to be faced by the Prosecution in *Abdul Rasheed* [1985] 1 MLJ 193. Such a move is undesirable, as it is unclear and confusing. If that section is invoked, it can only operate on the basis that the prosecution 'will not further prosecute' the accused. The decision whether to prosecute or not rests entirely with the prosecution: it is for the prosecution to decide whether or not it will further prosecute the accused on the charge in question; if it so decides not to do so, it ought to inform the court in clear terms. Upon the prosecution informing the court that it will not further prosecute the accused on the charge, the section comes into operation, and by virtue of its express terms alt the proceedings on the charge against the accused are stayed and the accused is discharged and such discharge shall not amount to an acquittal unless the court so directs or except in cases coming under s. 177 (this section is irrelevant for the purpose of this appeal). Therefore, in an ordinary case, the order of discharge under s. 184 does not amount to an acquittal. That this is the nature of the order is dictated by the express terms of the section and not by what the prosecution told the court as regards its intention on the future prosecution of the accused on the charge.

...

However, once he has instituted criminal proceedings against an accused on a charge and the proceedings are before the court, the conduct of such proceedings is subject to the overall control of the court. If a question in issue arises – whether one of fact or of law – then it is undoubtedly for the court to determine; indeed, the court is under an obligation to determine it. In determining such a question, including, where appropriate, exercising its discretion, if any, conferred by law, whether against the public prosecutor or otherwise, the court is not 'whittling down' the authority and powers of the Attorney General as the public prosecutor.

I now revert to s. 184(2) of the Criminal Procedure Code. With respect, I am unable to agree with the learned district judge on the limited and narrow construction he placed on the words, 'unless the court so directs', in s. 184(2). The words are unambiguous and clear, and effect must be given to them: they give to the court an unfettered discretion to direct, in appropriate circumstances, that the discharge shall amount to an acquittal. Section 184 subsists independently on its own, and its scope or operation is not limited by s. 180 or other provision of the Criminal Procedure Code. There is therefore no justification for holding that the Court can only exercise such discretion in the instances enumerated in s. 180 of the Criminal Procedure Code or when the prosecution informs the court that it will not further prosecute the accused and, in addition, formally withdraws the charge against the accused or has signified its consent to an acquittal of the accused.

> Where prosecution has been instituted against an accused on a charge, the decision whether or not to prosecute further the accused on the charge is one for the public prosecutor to make. Once he has made the decision not to prosecute the accused further, he ought in conformity to that section to inform the Court of his decision and s. 184(1) comes into operation. For the purpose of s. 184(2) he ought to further to inform the court of all relevant matters, for example, as in this case, the difficulty of tracing a material witness and his intention as to the likelihood of future prosecution of the accused on the charge. It is then for the court to decide whether it should direct that the discharge shall amount to an acquittal. The court is vested with a discretion by the express terms of this section and that discretion is, in my opinion, unfettered; but, of course, it must be exercised judicially, taking into consideration all the relevant facts and factors placed before it, including the intention of the public prosecutor as to the future prosecution of the accused on the charge. That, in substance, is how the section operates. (emphasis added)

[23] It is an anathema to the principle of fair play and justice to allow the prosecution to use the provision of s. 254 of the CPC to hold on to the charge and then charge an accused repeatedly on the basis that it intends to still prosecute the accused despite it being clear that there remain unresolved impediments in the progress of a trial. To allow such situation to continue without certainty when such impediments can be resolved would amount to an abuse of process of court.

[24] It is this court's firm view that when the conclusion of its case cannot be achieved despite multiple orders of DNAA and repeated refiling of a charge against the accused as in this application then the prosecution should not stand in the way of the accused's discharge and acquittal on the grounds of fair play and justice towards the accused. The prosecution must bear the consequences of its own failures. As held by the court in *Koh Teck Chai v. PP* [1967] CLJU 72; [1967] 1 LNS 72; [1968] 1 MLJ 166:

> Section 187(1) of the S.S. Code is identical with section 254(ii) and the application was made under that section so that it is clear that the learned magistrate had power to order an acquittal.
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> If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the Prosecution by being left with a charge hanging over his head indefinitely.
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> Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal.

Decision

[25] Based on the facts of this application, there are merits to justify the exercise of this court's powers of revision and judicial discretion. The Magistrate's order of discharge not amounting to acquittal in case MA-82D-28-08-2024 is hereby substituted with an order of discharge amounting to acquittal. The applicant is accordingly discharged and acquitted of the charge. Bail is ordered to be returned.